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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,

Petitioners,

vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Constitution mandates that protective custody inmates be provided with programs and services that are fully equal to those provided for general population inmates.

II. Whether the Court of Appeals misapplied this Court's standard with regard to the defense of qualified immunity.

III. Whether the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure violates the principle of judicial deference to prison officials in the operation of their institutions.

LIST OF PARTIES

The named petitioners were Michael Lane, director of the Illinois Department of Corrections since 1981; Richard DeRobertis, Stateville warden between July 1980 and November 1983; Michael O'Leary, Stateville warden after DeRobertis; Salvadore Goding, the assistant warden under both DeRobertis and O'Leary; Gayle Franzen, Department director from January 1979 to February 1981; Marvin Reed, warden from June 1979 to June 1980; and Lou Brewer, warden from September 1978 to June 1979.

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MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,

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vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Michael Lane, Michael O'Leary and Richard DeRobertis, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on June 27, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 851 F.2d 867 (7th Cir. 1988) and is attached as an Appendix (App. A). The order denying the petition

for rehearing and suggestion for rehearing en banc was entered by the Court of Appeals on August 29, 1988 and is attached as an Appendix (App. B). The injunctive order and the memorandum opinion of the United States District Court for the Northern District of Illinois, issued on August 31, 1987, and October 30, 1986, respectively are also attached as Appendices (App. C & D).

JURISDICTION

The basis for jurisdiction in the district court was the existence of a federal question based on the First, Eighth, and Fourteenth Amendments to the United States Constitution and Title 28 U.S.C. §§ 1331, 1343, and Title 42 U.S.C. § 1983. Under Title 28 U.S.C. § 1292(a)(1), the Court of Appeals had jurisdiction in appeal no. 87-2436 to review the injunctive order of the district court entered on August 31, 1987. The Court of Appeals also had jurisdiction in appeal no. 86-2922 to review that portion of the district court's October 21, 1986 memorandum opinion denying defendants' defense of justified immunity, with respect to an award of damages. An order denying the defense of qualified immunity is considered to be a final order under Title 28 U.S.C. § 1291 and immediately appealable. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2815-2816 (1985). By agreement, briefing on this appeal was stayed until the district court entered an injunctive order in this case which it did on August 31, 1987. Appeal nos. 87-2436 and 86-2922 subsequently were consolidated by the Court of Appeals. The Court of Appeals entered its opinion on June 27, 1988, and denied the petition for rehearing on August 29, 1988. Jurisdiction in this Court vests under Title 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proceeding for redress.

STATEMENT OF THE CASE

This case is a class action brought pursuant to Title 42 U.S.C. § 1983 by inmates incarcerated in the protective custody unit at the Stateville Correctional Center, a maximum security prison operated by the Illinois Department of Corrections. In their complaint, respondents sought injunctive relief and monetary damages against the petitioners, who are past and present administrators of Stateville and of the Illinois Department of Corrections. The respondents claimed that the petitioners had violated their constitutional rights by failing to provide them with equal access to the programs and services offered to general population inmates at Stateville. More specifically, the respondents alleged that the petitioners had denied them regular access to religious services and the law library, as well as subjecting them to substandard food, housing conditions, and job and educational programs in violation of the First, Fourteenth and Eighth Amendments to the Constitution.

After a bench trial on the merits, the district court issued an 80-page memorandum opinion finding that the respondents' constitutional rights had been violated and that they were entitled to injunctive relief. In its opinion, the court ordered petitioners to submit a proposed injunctive order remedying these constitutional violations. The court also ruled that the petitioners were not entitled to the defense of qualified immunity and that, therefore, an award of compensatory, and perhaps punitive, damages would be proper. The petitioners filed a notice of appeal from the denial of qualified immunity. Briefing on this appeal was stayed by agreement until the district court's entry of a final injunctive order.

After considering several proposed orders submitted by both parties, the district court entered a final injunctive order requiring the petitioners to "expeditiously adopt and implement policies and procedures for the operation of Stateville that shall at a minimum provide plaintiffs [respondents] with programs, housing accommodations and services comparable to those provided to Stateville's general population inmates, consistent with the opinion's findings and recommendations." The court further stated "to that end, if Defendants [petitioners] do not furnish fully *equal* provisions to plaintiffs in any respect in the course of complying with their duty to furnish comparable provisions, defendants shall promptly file reports with this Court identifying (a) such inequality and (b) the bona fide security considerations necessitating such inequal treatment." In addition, the court stated that it would "promptly appoint a special master pursuant to Rule 53 to monitor compliance with and implementation of the relief ordered in this case in keeping with the opinion's findings and conclusions. Pursuant to Rule 53 and as will be provided in an order of reference, all necessary expenses for carry-

ing out the special master's duties shall be charged upon Defendants." (App. C, p. 2) The petitioners filed a notice of appeal from this order. This appeal then was consolidated with the appeal of the district court's earlier order denying qualified immunity to the petitioners.

The Court of Appeals for the Seventh Circuit affirmed and ruled that the petitioners had violated the constitutional rights of the respondents. Essentially, the panel upheld the district court's ruling that the record failed to demonstrate security justifications sufficient to rationalize the restrictions placed on protective custody inmates' access to programs and services, and that the petitioners must provide protective custody inmates with programs and services equal to those provided to general population inmates. The court also ruled that the petitioners were not entitled to qualified immunity and that the appointment of a special master to oversee the implementation of the decision was properly within the authority of the district court.

REASONS FOR GRANTING THE WRIT

Whether the Constitution requires the provision of programs and services to protective custody inmates that are fully equal to those provided to general population inmates is a question of first impression in this Court. The Court of Appeals' decision mandates "constitutional" relief that has never been required by any decision of this Court and conflicts with a decision of its own Circuit as well as with another Circuit Court of Appeals. In addition, it strips prison officials of the defense of qualified immunity, disregarding the standards established by this Court,

and will subject the petitioners to thousands of individual damage claims. Finally, the decision approves the appointment of a special master to oversee the implementation of the district court's order in violation of a basic principle of law enunciated by this Court; that is, deference to prison officials in the operation of their institutions. The appointment of a special master allows the court to make important decisions regarding security and the allocation of prison resources, which had heretofore been made only by prison administrators. This decision by the Court of Appeals and its use of inappropriate legal standards will have a significant and detrimental impact on the operation of penal institutions by petitioners and other correctional officers throughout the country. For these reasons, the petitioners pray that a writ of certiorari issue to review the decision of the Seventh Circuit Court of Appeals.

I.

THE CONSTITUTION DOES NOT MANDATE THAT PROTECTIVE CUSTODY INMATES BE PROVIDED WITH PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE PROVIDED TO GENERAL POPULATION INMATES.

A. Introduction.

In its decision, the Court of Appeals panel recognized that the standard to determine the constitutionality of the restrictions at issue is the test articulated by this Court in *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254 (1987) and *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S. Ct. 2400 (1987). Petitioners submit, however, that the panel's decision did not properly apply the *Turner-O'Lone* standard in ruling that the restrictions imposed on programming for protective custody inmates were unconstitutional.

In the *Turner* and *O'Lone* cases, this court identified four factors that must be weighed in judging the constitutionality of a prison regulation. The first requirement is that the regulation have a valid, rational connection to a legitimate penological interest. To prove the absence of such a connection, it must be shown that the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or "irrational." *Turner*, 197 S. Ct. at 2262. The second factor is whether "alternative means of exercising the right remain open to prison inmates." *Id.* at 2262. Third, an assessment must be made of "the impact accommodation of the asserted constitutional rights will have on guards . . . other inmates, and . . . prison resources generally." If such a "ripple effect" exists, particular deference must be accorded to prison officials. *Id.* Finally, the absence of "ready alternatives is evidence of the reasonableness of a regulation. . . . This is not a 'least restrictive' test: prison officials do not have to set up and then shoot down every conceivable alternative. . . ." *Id.* The Court stated that to be considered, an alternative would have to fully accommodate the prisoner's right at a *de minimus* cost to valid penological interests. *Turner*, 107 S. Ct. at 2262. Employing these factors, the Court in *O'Lone* upheld a restriction which absolutely prevented Muslim inmates assigned to an outside work detail from attending weekly Jumuáh, the central communal service of the Muslim religion. The Court ruled that the absolute restriction of this once-a-week movement of general population prisoners was logically related to prison security and orderly administration. *O'Lone*, 107 S. Ct. at 2405.

B. The Court Of Appeals Misapplied This Court's Standard For Review Of Prison Policies.

This test and the decision reached by this Court in *O'Lone* cannot be reconciled with the conclusion of the Court of Appeals in the instant case which found *no* logical connection between restricting the programming of protective custody inmates and the security of these inmates. The petitioners submit that this conclusion is clearly erroneous, regardless of any credibility findings made by the district court, since there is compelling evidence in the record which reflects a logical relationship between the restriction of protective custody movements and security, the most fundamental of penological objectives.

It is undeniable that there exists a rational basis between restricting the access of protective custody inmates to programs and the security of these inmates. Not only does the decision of the Court of Appeals in the instant case not credit this principle, but it also conflicts with another decision within the Circuit. In *French v. Owens*, 777 F.2d 1250 (7th Cir. 1985), four inmates at an Indiana prison filed a class action suit complaining of constitutional violations with regard to conditions at the prison. One of these allegations was that those prisoners who were confined in protective custody did not have equal access to the same vocational, academic and rehabilitative programs as those in the general prison population. The district court in *French* ruled that providing access to programs to general population inmates and denying them to inmates in protective custody was a violation of the Equal Protection Clause of the Fourteenth Amendment. It concluded that treating protective custody inmates differently than those in general population did not have any rational

basis, especially when the state had created conditions necessitating the widespread use of protective custody. On appeal, the Seventh Circuit reversed, stating that security reasons justified limiting the access of prisoners in protective custody to the programs and services offered to the general population:

> Protective segregation is offered to inmates for their safety, the safety of others in confinement, and to insure institutional security and order. To allow prisoners in protective custody to enjoy all the same privileges to the same degree as those in the general population would eviscerate the nature of protective segregation. Because the difference in treatment among prisoners in protective segregation and the general population has a substantial rational basis in the legitimate state interest of prison security, we hold that . . . rights to equal protection have not been abridged.

777 F.2d at 1256 (quoting *Allgood v. Morris*, 724 F.2d 1098, 1100-1101 (4th Cir. 1984).

The Court of Appeals ruling in the instant case also conflicts with a decision of the Fourth Circuit Court of Appeals. In *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986), the plaintiffs alleged that, as protective custody inmates in a North Carolina prison, they were denied equal access to religious services, the library, recreational programs, jobs and rehabilitative programs. The defendants did not dispute these differences, but contended that they stemmed from security considerations. The Fourth Circuit ruled that less favorable conditions imposed on prison inmates requesting protective custody do not violate the inmates' equal protection or due process rights where the restrictions bear a rational relationship to the protection of the prisoners requesting such relief and where the restrictions

are not so onerous as to jeopardize their health. 781 F.2d at 1050.

In the instant case, trial testimony disclosed that the access to services which is provided to Stateville's protective custody inmates is consistent with contemporary correctional practices. (Vol. 10-A, pp. 24-25) In fact, Stateville is one of a relatively small number of maximum security institutions which is accredited by the American Correctional Association (ACA). One of the requirements for accreditation is a showing that protective custody inmates have been given adequate access to religious, library and other services. (Vol. 10-A, p. 38) *See Cody v. Hillard*, 799 F.2d 447, 451 (8th Cir. 1986), where ACA guidelines were relevant in determining an Eighth Amendment claim. Furthermore, in determining reasonableness, the fact remains that while prison officials may differ on the exact balance to be drawn between access to programs and services and the restriction of movement of protective custody inmates for safety reasons, no prison in this country has ever provided its protective custody inmates with the *fully equal* programs and services demanded by the Court of Appeals in the instant case.

There are several reasons for this disparity in programs and services. First, protective custody is considered to be a temporary status. At trial, Judith Pederson, a caseworker supervisor at Stateville since 1984, testified that 90 percent of the inmates in the protective custody unit at Stateville stay less than one year and 20 percent stay less tha one month. (Vol. 7-B, p. 240) Michael Huff, also a caseworker at Stateville, testified that the average stay in protective custody is less than six months and that no more than 30 to 40 inmates at Stateville have been in protective custody for a substantial length of time. (Vol.

7-A, pp. 209-10) It should be noted that neither Pederson's nor Huff's testimony was discredited by the district court in its memorandum opinion. In addition to the temporary nature of protective custody, this Court can take note of the extremely violent inmate population at Stateville, (Vol. 7-A, p. 6; Vol. 10-B, p. 109), and the fact that all protective custody placements are made at the request of the inmates themselves. (Vol. 7-B, p. 203) The petitioners submit that in light of these three factors, there exists a rational basis for the restrictions on protective custody programming at Stateville.

The Court of Appeals decision also failed to apply the other *Turner-O'Lone* factors in a manner consistent with this Court's direction. In its opinion, the panel brushed aside the fact that the petitioners have afforded protective custody inmates alternative ways to exercise their restricted rights, particularly in the areas of religion and access to the law library. Similarly disregarded was the substantial financial burden that the trial court's order will impose on the State of Illinois. The recognized class in the case includes over one thousand inmates, and the relief ordered by the district court in its final injunctive order will include not only individual awards of damages to these inmates, but a total restructuring of protective custody programs and services.

It should be noted that securing these funds will jeopardize money available for programming, security, facilities, and services provided to those state prisoners who are not confined to protective custody. Compliance with the court's order will require the petitioners to request supplemental appropriations from the legislature, renovate existing structures or possibly construct additional structures, prepare staffing and utilization studies, and hire and

train additional staff. These alternatives are hardly the type which "fully accommodate the prisoner's right at *de minimus* cost to valid penological interests", as was contemplated by this Court in the *Turner* and *O'Lone* cases. All of the options proposed by petitioners to achieve compliance will have substantial "ripple effects" on guards, other inmates, and prison resources generally, in violation of the standards set out in these cases.

Finally, in spite of the district court's discrediting of the testimony of Wardens O'Leary and DeRobertis, the fact remains that the implementation of the district court's order will pose a substantial risk to the safety and security of protective custody inmates. At trial, Assistant Superintendent Travis Wheaton and A. C. Parke, a consultant for the Commission for Accreditation, testified that restrictions on the out-of-cell movements of protective custody inmates, as well as limitations on the numbers of these inmates moved at any one time, are the chief means used by administrators to safeguard these inmates from the general population and each other. (Vol. 8-B, pp. 128-129; Vol. 10-A, p. 49) For this reason, Parke stated, he did not know of any prison that offered protective custody inmates programs and services fully equal to those offered the general population. (Vol. 10-A, p. 52) In addition, if Stateville were to offer programs for protective custody inmates at night (as may be required if the district court order is implemented) this would greatly increase the risk of escape, render supervision by the guard tower more difficult, and increase the possibility of violence. (Defendant's Response to Plaintiff's Proposed Order) Finally, given the complex time schedules and space constraints of Stateville (which houses some 2,000 inmates, only 300 of which are in protective custody), increasing protective

custody programs will of necessity disadvantage the remainder of the population, as well as place additional burdens on the Stateville security personnel.

In considering whether to grant this petition, this Court should note that there is an overriding public interest in the proper resolution of the legal issues presented by this case. Stateville is only one of many maximum security institutions in this country, and the opinions of the district court and the Court of Appeals raise issues of equal programming and services that will invite litigation from thousands of protective custody inmates in other institutions who wish to be accorded similar treatment.

II.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARDS WITH RESPECT TO THE DEFENSE OF QUALIFIED IMMUNITY.

In its memorandum opinion, the district court ruled that the respondents had established a right to awards of compensatory and perhaps punitive damages:

> 13. Plaintiffs have also established the predicate for an award of compensatory damages. Although no award may be made for defendants' denials of constitutional rights as such . . . they are entitled to damages for injuries that can be measured in monetary terms: (a) pain, suffering, and mental anguish already suffered and proximately caused by defendant's unlawful actions; (b) pain, suffering and mental anguish reasonably certain to be suffered in the future from the same causes; and (c) back pay . . . for lost wages from defendants' failure to provide plaintiffs with opportunities to have jobs or participate in educational or vocational programs, as

> well as for the impairment of their earning capabilities.
>
> . . . . .
>
> 15. In addition to actual damages, the law permits an award of punitive and exemplary damages to punish egregious violations of constitutional rights and to serve as a warning to others not to engage in such conduct. Such damages are recoverable "if the defendants' conduct involves reckless or callous indifference to the plaintiff's rights, or if the action is motivated by evil intent.' . . . Because neither plaintiffs' nor defendants' counsel have focused fully on just which defendants are and which are not liable for such damages and on the amount of such liability, final entry of such award will await further submissions by the parties. (citations omitted) (App. D, pp. 60-61)

The petitioners submit that the district court erred and that they are immune from awards of monetary damages through the application of qualified immunity. In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738 (1982), this Court held that government officials generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *See also Anderson v. Creighton*, ____ U.S. ____, 107 S. Ct. 3034 (1987). In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 816 (1985), the Supreme Court stated that, when reviewing a denial of a claim of qualified immunity, the appellate court must decide only a question of law; namely, "whether the legal norms allegedly violated by the defendant were *clearly established* at the time of the challenged actions." (emphasis supplied) 473 U.S. at 511.

In affirming the district court's decision on this issue, the Court of Appeals not only misapplied this standard,

but also ignored the standards articulated by its own circuit in earlier decisions. The Seventh Circuit has given great weight to the need to protect defendant public officials in assessing qualified immunity claims. For example, in *Benson v. Allphin*, 786 F.2d 268, 272 (7th Cir. 1986), the court concluded that "whenever a balancing of interests is required, the *facts* of the existing case law *must closely correspond* to the contested action before a defendant official is subject to liability." (emphasis supplied) Similarly, in *Abel v. Miller*, 824 F.2d 1522, 1533 (7th Cir. 1987), the court stated that "[t]o determine whether such legal claims existed at the pertinent time, we often refer to closely analogous cases decided before the public officials acted or failed to act."

In denying the petitioners qualified immunity, the district court in the instant case relied on Supreme Court cases which established general constitutional rights for prisoners, such as access to the courts or free exercise of religion. Cases such as *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977) and *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079 (1972) in establishing these rights, however, did not set up any specific mandates but rather general guidelines for prison officials to follow. In the *Bounds* case, this Court ruled that prison inmates have a constitutional right of access to the courts which "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law." (emphasis supplied) 97 S. Ct. at 1498. After discussing several alternative methods of satisfying this constitutional right, this Court stated that "a legal access program need not include any particular elements we have discussed and *we encourage local experimentation*." *Id.* at 1500 (emphasis supplied). The real

test as to whether this obligation has been met, the Court concluded, is whether the plan gives "prisoners a reasonably adequate opportunity to present claimed violations of fundamental rights to the courts." *Id.* at 1496.* In the *Cruz* case, this Court found that the state had failed to provide the plaintiff with reasonable opportunities to exercise his Buddhist religion, retaliated against him by placing him in solitary confinement, and prohibited him from corresponding with his Buddhist religious advisor, in violation of his right of free exercise of religion. 92 S. Ct. at 1080. The Court did *not*, however, conclude that inmates must receive communal religious services, religious instruction or private religious counseling, as did the district court in this case.

Nor did this Court consider, in either the *Bounds* or *Cruz* cases, the rights of protective custody inmates vis-a-vis general population inmates in light of the special security needs of the protective custody inmates. In fact, as discussed in Argument I, no court has ever ruled that the equal protection clause requires that protective custody inmates must be provided with programs and services fully equal to those provided to general population inmates, as the Court of Appeals has done in this case. Thus, petitioners urge this Court to address these issues in order to provide guidance to prison officials throughout the country.

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* In a case tried simultaneously with the instant case in the Northern District of Illinois, Judge Anne Williams took note of the district court decision in this case but ruled that the access to the law library at Stateville as a whole was constitutionally adequate under *Bounds*. *See Shango v. Jurich* (slip op. decided July 15, 1988). (App. E, pp. 1-15)

III.

THE APPOINTMENT OF A SPECIAL MASTER PURSUANT TO RULE 53 OF THE FEDERAL RULES OF CIVIL PROCEDURE VIOLATES THE PRINCIPLE OF JUDICIAL DEFERENCE TO PRISON OFFICIALS IN THE OPERATION OF THEIR INSTITUTIONS AND IS NOT WARRANTED BY THE FACTS OF THIS CASE.

The district court's final injunctive order required the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure to monitor "implementation of the relief ordered in this case in keeping with the opinion's findings and conclusions." (App. C, p. 5) Rule 53(b) provides, however, that a court must appoint a special master "only upon a showing that some exceptional condition required" this appointment. In its opinion, the Court of Appeals acknowledged that a district judge's authority to make a referral under Rule 53, if not consented to by the parties, is limited, *LaBuy v. Howes Leather*, 352 U.S. 249, 77 S. Ct. 309 (1957), but stated that "appointing a special master directed to supervise and coordinate the actions of prison officials to effectuate full compliance is especially appropriate for cases such as this challenging conditions of confinement." (App. A, p. 28)

The petitioners submit, however, that the appointment of a special master in this case violates a fundamental principle of law enunciated by this Court in prisoners' rights cases; that is, judicial deference to prison administrators in the operation of their institutions. Because of this, petitioners contend that they must be able to direct any implementation of the district court's order. As this Court stated in *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 1807 (1974), the solutions to problems of prison reform "require expertise, comprehensive planning and the commitment of resources, all of which are peculiar-

ly within the province of the legislative and executive branches of government." The Court also noted that "where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." *Id.*

The Court of Appeals attempted to justify the appointment of the special master by stating that the petitioners' had failed to comply with the district court's memorandum opinion, and that "Judge Shadur cannot be expected to neglect his busy schedule to ensure that the recalcitrant defendants no longer violate the basic rights of this class." (App. A, p. 28)

In the instant case, petitioners contend that there has not been a showing of any actions on the part of petitioners failing to comply with an order of the district court to remedy any specific condition at Stateville. The district court's findings of noncompliance and intransigence center instead on the failure of petitioners to submit proposals *acceptable to the district court.* These findings are not sufficient to support the extraordinary relief of appointment of a special master.

Furthermore, the cases cited by the Court of Appeals as authority for the appointment of a special master are factually very different from the instant case. In *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163 (5th Cir.), *amended in part and vacated in part*, 688 F.2d 266 (1982), *cert. denied*, 460 U.S. 1042, 103 S. Ct. 1348, the Court of Appeals, in upholding appointment of a special master, noted several factors in addition to lack of cooperation by defendants as the basis for appointment. Those factors included the difficulty in supervising a comprehensive plan applying to the entire Texas prison system and noncompliance with court orders. In *Gary W. v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979), also cited with approval by the

panel as supporting the appointment of a master, petitioners had allegedly been in noncompliance with a court for a period of two years.

Finally, while the panel noted Judge Shadur's congested docket as a basis for appointment of a master, that basis was explicitly rejected in *LaBuy v. Howes Leather*, 354 U.S. 249, 77 S. Ct. 309 (1957). Thus, it appears that the appointment of a special master cannot be sustained by either the case law or the facts of this case.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

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